SUPREME COURT, U. S.

JUL 14 1975

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-84

THE FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, INC., ET AL., PETITIONERS

v.

FIREBIRD SOCIETY, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No.

FIREBIRD SOCIETY, ET AL.,
Plaintiffs-Respondents

v.

MEMBERS OF THE BOARD OF FIRE COMMISSIONERS CITY OF NEW HAVEN, ET AL.,
Defendents-Respondents

THE FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, DONALD ACERRA, RAYMOND CASSISTA, JOHN CLEARY, RAYMOND LUYCKS, KNUT SONDERGAARD, MARTIN O'CONNOR, FRED GEIER, JR., CHARLES DOLL, GEORGE BOUCHER, PETER SERLETTI, NICHOLAS POULMAS, EDWARD FLYNN, JOHN REARDON, ALBERT SERLETTI, WILLIAM MOONEY, WILLIAM MCKAY
Intervenors-Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioners — Firefighters' Committee to Preserve Civil Service, Inc., a non-profit Connecticut corporation, and named individual members at various ranks of the New Haven, Connecticut, department of Fire Services, on behalf of themselves and others similarly situated, respectfully pray that a Writ of Certiorari issue to review the judgment

of the United States Court of Appeals for the Second Circuit entered on April 15, 1975.

The judgment of April 15, 1975 was rendered by a panel of judges who affirmed without written opinion the opinion of the United States District Court for the District of Connecticut (Zampano, J.). The latter opinion is thus far unreported and is reprinted in its entirety in an appendix hereto.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals of the Second Circuit was entered on the 15th day of April, 1975. This petition was filed within 90 days of that date. Jurisdiction of this court is involved pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Should nonminority public servants be made parties to Equal Employment Opportunity litigation seeking to abrogate their contractural, statutory and constitutional employment rights?
2. Do Nonminority Public Servants have a right to be heard prior to the finalization of any Equal Employment Opportunity litigation settlement adversely affecting and changing their employment status and opportunities?
3. Did the lower courts err in denying the application to intervene?
   A. Do Appellants have an "Interest" in litigation affecting their employment expectations, rights, status, opportunities and conditions of employment?
   B. Was the application to intervene timely?

C. Were appellants adequately represented by other parties all of whom had interests conflicting with appellants?

4. Does not 703 (j) of Title VII of the Civil Rights Act of 1964 Prohibit quota type remedies at the promotional level? At the hiring level?

STATUTES INVOLVED

Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, Rule 19 (a) of the Federal Rules of Civil Procedure; and Section 703 (j) of Title VII of the Civil Rights Act of 1964, 42 USC, § 2000 e-2 (j) are reprinted in an appendix hereto.

STATEMENT OF THE CASE

I. The Proceedings

This petition arises from the denial of petitioners' Application To Intervene as defendants and cross-claimants, in a case which proceeded in an unusual manner from the filing of the Complaint on October 5, 1973 through the filing of the Court Order of August 30, 1974 which prompted the Application To Intervene.

The original action, brought as a class action on behalf of blacks and Hispanics, (referred to in the Complaint collectively as minorities) sought injunctive and monetary relief to remedy what it claimed to be discrimination in hiring and promotions within the New Haven Department of Fire Services. Plaintiffs invoked Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. § § 1981 and 1983, claiming jurisdiction under 28 U.S.C. § 1331 and 1343 (3) and 42 U.S.C. § 2000e-5 (f).

The plaintiffs were the Firebird Society of New Haven, Inc., an organization of black members of the New Haven Fire Department, and certain named blacks who are either members of the Department seeking promotion, or black persons who had applied and failed the entrance examination, who been rejected appointment to the New Haven Department of Fire Services, or were prepared, ready, willing and able to apply for a job in the Department.

The named defendants were the Members of the New Haven Board of Fire Commissioners and the Members of the New Haven Civil Service Commission, the Chief of the New Haven Department of Fire Services, and the Mayor of the City of New Haven. None of the petitioners were named as defendants in the action.

In the Complaint plaintiffs sought a temporary injunction in effect enjoining and restraining any appointments to or promotions within the Department and permanent injunctions requiring quota promotions only for those persons within plaintiffs' class, a revision of the system of promotion and hiring, a granting of seniority to plaintiffs and members of their class back to the date they first applied for a position and the award of one million dollar actual and one million dollar punitive damages.

A temporary restraining order was entered ex parte on October 16, 1973 without a factual hearing. A preliminary injunction was apparently thereafter agreed to. On October 29, 1974 the preliminary injunction freezing all appointments and promotions was continued until further order of the Court and as a practical matter continued throughout the litigation with certain exceptions.

On December 5, 1973 the first of the Orders "not agreed to but acquiesced to by all parties" was entered. The order

purportedly covered agreement upon recruitment, hiring, promotions, time and grade, damages, costs and continuing jurisdiction of the court. On that same date a second part of that Order which was sealed until the Order of August 30, 1974 was also entered but by order of the court a second, and perhaps the most crucial portion of the *in camera* agreement reached, was sealed and withheld from public disclosure. That portion clearly related to an agreement for quota promotions to the rank of lieutenant, and thereafter to the rank of captain. No adequate explanation other than a desire to prevent petitioners and members of their class from learning of the agreement has ever been offered for the sealing of this portion of the Order of December 5, 1973.

On December 10, 1973 the City of New Haven was made a party defendant to the case and service was made upon City Counsel in chambers.

Following the December Order an examination for promotion to the rank of lieutenant specially designed by a University of Connecticut professor was held. The results of that examination disclosed that the blacks who took the exam did poorly and there were not seven who fairly passed the exam. The failure of the blacks to perform well on the examination apparently caused the litigation to begin to be reactivated still with the December 5, 1973 Order sealed.

On May 21, 1973 the Court issued an Order enjoining all parties or officers from disclosing to any persons any material relating to any individuals examination score, test rating, efficiency rating, standing on promotion lists, and that all copies of examinations and efficiency rating scores and promotion lists presently under control of any party or any said party's officers should forthwith be turned over to counsel

for that party. On May 22, 1973 defendants filed an answer. Depositions were noticed but apparently never held, and on August 30, 1974 the Court issued its Order, again agreed to but not acquiesced in by all of the parties to the suit in order to end the litigation. The Order for the first time publicly disclosed an agreement covering not only quota hiring relief but also quota promotional relief. The Court ordered promotions to the rank of lieutenant to be made from a list attached to the Order. In essence, the list slotted in blacks who had not otherwise earned those positions on the examinations in the fourth, seventh, tenth, thirteenth, sixteenth, nineteenth and twenty-second slots. Indeed, most of those slotted in had not even passed the examination.

On September 20, 1974 appellants filed the Motion To Intervene to reopen the Order of August 30, 1974 to extend time to file an appeal from the Order of August 30th. An Order To Show Cause why the Motion should not be granted was issued and the hearing was held on October 1, 1974. At the hearing no evidence was offered because of the time pressures on the court but it was agreed that for purposes of the motions the court would accept appellants' offers of proof to be submitted and would either accept those factual representations as true or would hear testimony on the matter.

Offers Of Proof were filed and the District Court on February 4, 1975 denied the motions. A timely Notice Of Appeal was filed to the Second Circuit which affirmed the lower court's decision.

Petitioners

The corporate intervenor is a nonprofit Connecticut cor-

poration which was organized in September of 1974 whose charter purpose was, prompted by the Court's Order, to preserve a system of appointments to and promotions within municipal departments based solely on merit and devoid of considerations of race, religion, creed or political consideration. The great percentage of non-minority firefighters in New Haven have joined the organization and have contributed to it. In addition, there are several named individuals who were currently on the lieutenants list affected by the Court's Order and other individuals of varying ranks in the Department. All sought to intervene individually on behalf of themselves and all others similarly situated. In effect they sought *to represent the non-minorities in an effort to have a voice in any order which would affect their future in the New Haven Department of Fire Services.* Acerra, Cassista, Cleary, Luycks and Sondergaard were all persons on the lieutenant list who would have received higher ranking but for the provisions slotting in the minorities above them.

The intervenors did not have proper notice of the action and should have been named as parties to begin with. But the only attempted effort to notify individuals of the pendency of the law suit was contained in a copy of a notice which was sent to the firehouses to be posted on the bulletin boards. The notice did not even contain the entire complaint. The posting of such notice to the extent that any were posted, is not a method capable of reaching the vast majority of firefighters for several reasons, including the following.

Firefighters work different schedules often having several days off in a row during which old notices are covered over or taken off the Bulletin Board. Many firefighters do not

read the Bulletin Board. Important notices are brought to the attention of the firefighters by reading the same at roll call and this notice never was read at any roll call.

It was the understanding of all the individual intervenors that all that was being sought in connection with any settlement of the pending law suit was the institution of job validated examinations, a goal with which the intervenors agreed. That information was based in part upon a statement of the president of the Firebird Society at a union meeting that the Firebirds were seeking only non-culturally biased competitive examinations. The intervenors had no way in finding out the terms and conditions of that sealed Order because the parties to it were enjoined from disclosing the terms and conditions of that Order by the Court If the Order had been publicized and had not been kept secret the intervenors would promptly have attempted to intervene to oppose any plan contemplating promotions or appointments based on race.

The intervenors were prevented from intervening by their lack of knowledge caused by the delivered actions of the Court and the parties to the case. The list attached to the Order of the Court of August 30, 1974 in which minority members have been slotted in does not reflect the promotional merit of the persons on the list. This was so despite the fact that the examination from which the list was compiled was job related and one doing better on the exam could reasonably be expected to do better on the job. Performance on that job is important, not only to the morale of the Department, but indeed to the very health and safety to the members of the Department. A less qualified lieutenant might make a fatal error in judgment affecting the lives and safeties of the intervenors and the class they purport to represent as well as the citizens of New Haven.

Since the City of New Haven has the addresses of all of the members of the Department of Fire Services the plaintiffs or the defendants could easily have notified by registered mail all of the applying intervenors and the members of their class of this suit or at least of the proposed settlement so that any member of the Department of Fire Services would have had an opportunity to intervene in the action if he saw fit.

The intervenors further offered to prove that as the sealing of the Order of December of 1973 indicates the entire course of the proceedings was designed to prevent knowledge of the settlement, namely to prevent the intervenors and the class they seek to represent from understanding what the parties were doing. The reason for secrecy was the fact that the parties to the litigation knew the intervenors would oppose the Order and sought to exclude them from consideration in the settlement process. The intervenors were not consulted either individually or as a group in reaching the proposed settlement which was ultimately implemented in the Court's Order of August 30, 1974. Contrary to the District Court's assumption the Union officials did not participate in any significant manner in the settlement discussions leading up to the August 30, 1974 Order. Indeed, the president and secretary/treasurer of the local Union were not aware of any promotional Order until August 29, 1974.

REASONS FOR GRANTING THE WRIT

I. THIS PETITION PRESENTS THIS COURT WITH AN OPPORTUNITY TO DELINEATE THE PROCEDURAL AND SUBSTANTIVE RIGHTS OF NONMINORITY PUBLIC SERVANTS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION.

The overriding concern of this appeal is the delineation of the rights of nonminority public servants, here firefighters, in litigation seeking to abrogate their constitutional, statutory, and collective bargaining employment expectations. We believe the procedural law of Equal Employment Opportunity suits should require all nonminorities potentially affected by such cases to be formally notified and afforded an opportunity to intervene or preferably to be named as parties under Rule 19 as class defendants under Rule 23.

The nonminorities are in our view necessary parties without whom there cannot be a just adjudication. This kind of litigation is by definition racially divisive since its purpose is to categorize individuals by race and to segregate them in pursuit of common economic goals. When court orders instituting racially separate procedures are the result of *in camera*, sealed and secret proceedings, the wounds of discrimination against the nonminorities are aggravated by the salt of nonparticipation. The resultant scars are deeper, longer lasting, and unjustifiable.

Strict adherence to the rules and open, not closed, hearings are called for. They were not here present.

A. Petitioners Have An Interest In The Proceedings

Denying the Application To Intervene the District Court held (1) the applicants had no "interest" in the subject matter of the action; (2) the application was untimely; and (3) the applicants were adequately represented by the existing parties and the intervenors. In reaching these positions the Court relied on factual assumptions which were at odds with our offers of proof and thus in contravention of the ground rules set by the Court at the hearing.

Nonetheless assuming the lower court's facts to be correct, its denial of the application was erroneous. To the extent the decision was discretionary, (which we do not believe it was) that discretion was abused.

Rule 24 (a) allows for intervention by a person so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. In *Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission*, 482 F2d 1333, 1341 (2 Cir. 1973) the Second Circuit recognized the important interest which nonminorities had in the outcome of suits of this like. There the Court found that the district court's quota relief order at the promotional level constituted an abuse of discretion although is "gingerly" approved the relief at the initial hiring stage. It stated,

> "While past exclusionary hiring examinations do justify the quota remedy on entrance, there is no justification in our view for extending the remedy to higher ranks. . . . While this factor will delay those of the minority groups who will become patrolmen, the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement, only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish social attitudes. . . . We see no purpose in curing a past mischief by imposing a new one which is deliberately tainted. We would strike from the judgment below therefore all quota requirements above the rank of patrolmen . ."

Thus we find it difficult to accept that those most immediately affected by the relief order from a direct economic as well as safety point of view can be said to be without an interest. We shall later discuss the interest as it applies to

intervention, but here we consider whether petitioners should have been parties at the start.

1. Petitioners Should Have Been Formal Parties To Litigation From The Start

We believe, as we argued below that sound policy requires persons in petitioners position to be named in the first instance either under Rule 19 as persons needed for a just adjudication or pursuant to Rule 23 as class defendants. Taken together Rules 19, 23, and 24 express the intent of the Federal Rules that "interested" persons or persons affected by the outcome of the litigation be participants. The language in Rule 19 (b) (2) and 24 (a) (2) is virtually identical. Moreover, both rules are, of course, subject to Rule 23 covering class proceedings. 3A Moore, Federal Practice 2121 (1974). Thus the test of "an interest" under all three rules would appear to be the same. *Atlantis Dev. Corp. v. United States* 379 F.2d 818 (5 Cir. 1967); 3A Moore, supra at pocket party 57. The criteria for 19 (a) and (b) applicability follow *Shields v. Barrow* 17 How. 130, 139, 15 L.ed 158 (1854). The Supreme Court there defined indispensable persons as those who "not only have an interest in the controversy, but are interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Appellants meet this criteria. Focusing on the potential effect of the promotional aspect of the August 30, 1974 Order, it is clear that appellants are the persons most directly affected by the Order. If the Order is implemented it is the individual appellants whose promotion to the rank of lieutenant will be denied or delayed. The consequent

economic and emotional losses are directly inflicted upon them.

If they are not permitted, indeed required, to be parties what is their status? When do they have their day in Court?

They claim, inter alia:

1. The examination from which the promotional list was compiled was job related;
2. That a less qualified lieutenant might make a fatal error in judgment affecting their lives and safety;
3. The efficiency rating system was applied in a reversely discriminatory manner;
4. Reverse discrimination will have a serious detrimental effect on the morale of the members of the department; and
5. That they were intentionally denied access to information concerning the nature, goals and progress of the suit.

If those claims are not here heard will the applicants be free to pursue their remedies elsewhere, such as separate litigation in the State Court or a separate unit in the federal courts?

2. Petitioners' Interest Is Sufficient To Require Intervention.

The lower Court's determination that applicants lacked a definable interest contravenes not only the *Guardians* decision, *supra*, but the sound policies of unitary adjudication contained in the Federal Rules. The determination of an interest is a pragmatic one. 3A Moore, supra at 2229, see *Washington v. United States*, 87 F2d 421, 427-428 (9 Cir. 1936).

Rather than taking the pragmatic approach the District

Court focused on the status of the particular named individuals. It should have recognized that if Blacks have an "interest" sufficient to justify a class action in alleged anti-minority discriminations in the hiring and promotion procedures, then Whites surely have at least the same interest in protecting themselves, their jobs, and their livelihoods from reversely discriminatory procedures. Had it not, it would not have overlooked the fact that intervention was sought on behalf of a *class* of nonminorities.

Each of the individual applicants* has embarked upon a fire career with the expectation of advancement. Cf. *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission* at 1341. The privates and other nonminorities will be either denied immediate appointment or delayed in future appointments to the rank of lieutenant. To the extent seven blacks are slotted into positions they have not earned those positions are foreclosed to better qualified whites solely by reason of race. The current lieutenants face delay in opportunities for promotion to captain. All of the intervenors affected by the time in grade changes.

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*The F.C.P.C.S. is a proper organization to raise the issue sought to be raised by the application for intervention and the cross complaint. Several courts have held "that an organization whose members are injured may represent those members in a proceeding for a judicial review". *Sierra Club v. Morton*, 405 U.S. 27, (1972); *NAACP v. Button*, 371 U.S. 415, 428 (1963). This is especially true when representation of the interest is the primary reason for the organizations existence. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2 Cir 1968); *U.S. v. Board of School Commissioners-Indianapolis*, 466 F.2d 573, 576 (7 Cir. 1972).

Beyond the above each of the intervenors has a direct and important interest in maintaining the morale of the Department and in being led by the most qualified personnel.

B. The Application Was Timely

1. Intervention After Judgment Is Permitted.

Intervention pursuant to Rule 24 must be timely. Of course there is no timeliness barrier if as we have argued our interest required us to be formally served. However, if Rule 24 intervention is all that is open, the Application here was timely. Timeliness is to be determined from all of the circumstances of case, *Kozak v. Wells* 278 F.2d 104, 109 (6 Cir. 1960); *Clark v. Sandusky*, 205 F.2d 915, 918 (7 Cir. 1954); 4 Moore, Federal Practice 2413. *Wolpe v. Poretsky*, 144 F.2d 505, 508 cert. den. 323 U.S. 777; *Pelligrino v. Nesbit*, 203 F.2d 463, 465; 37 ALR 2d 1926; and cf. *Turner v. Willard*, 157 F. Supp. 451 (SDNY 1957) (where intervention to reopen a judgment was denied but allowed for purpose of taking an appeal). It has been allowed at various stages of the proceedings and for various purposes. In *U.S. v. School Dist. Okla.* 367 F. Supp. 198, 201 (D. Okla. 1973), intervention was permitted on certain conditions even after a full and plenary hearing on the merits. *A fortiori* here where there has been no such hearing or notice, it should be allowed. In *U.S. v. Board of School Commissioners of Indianapolis*, 466 F.2d 573, 576 (7 Cir. 1972), the Court of Appeals reversed the trial judge's final order of denial of intervention conditioning the same upon appellants' adoption of all previous adjudications.

The circumstances here including the vital interest in the proceedings of appellants, the failure of the parties to follow formal notification procedures, the fact that the case proceeded behind closed doors and by sealed proceedings (discussed below) and the willingness of petitioners to proceed expeditiously (it is, of course, in their interest to do so) all indicate the application was timely.

2. The Chambers Conferences Which Led To The August 30, 1974 Order Were Designed To Prevent Petitioners From Learning Of The Promotion Order

Throughout our offers of proof we have pointed out that the entire settlement proceedings were designed and implemented in a manner not to inform petitioners of the settlement procedures, but to keep the most volatile aspects from their knowledge.

Neither the lower Court nor the parties ever have offered an adequate explanation for the orders of secrecy. The obvious concern was that if the quota promotions were disclosed, appellants would seek to intervene to prevent their implementation.

Indeed the District Court judge acknowledges that all chambers conferences were marked by "off the record" discussions, but his reliance on media leaks as a source of information is not only injudicious, but also erroneous. Appellants had no knowledge of the promotional settlement.

Thus appellants sought to intervene within ten days of the first moment they learned of promotional relief. Under the circumstances of this case intervention is timely.

The intervenors' Application To Intervene also falls within the rule set down by this Court in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 87 S. Ct. 932 (1967). There this Court reversed an order denying on appellants the right to intervene an antitrust action brought by the United States against El Paso Natural Gas Company. The intervention was permitted not only after the institution of the case, but after the case had once been to the Supreme Court.

3. The Initial Notice Was Not Sufficient To Deprive Petitioners Of The Right To Intervene

The District Court and the Court of Appeals placed great reliance on the posting of a notice in the Fire Department concerning the lawsuit at the start of the litigation. Aside from the fact that there is no proof that the notices were actually posted, it is clear that even if they were they were not adequate. The posting of notices to the extent any notices were posted is not a method capable of reaching the vast majority of firefighters. Ibid.

How easy it would have been to send each fireman a registered letter! The cost would hardly have exceeded $50.00. If the posting of notices was intended to comply with Rule 19 or Rule 23, it did not. Notice should be the best practicable under all the circumstances including individual notice to all members who can be identified with reasonable effort, See 3B Moore, supra at 23-1157. Best notice here is with the United States mails. Too many formalities in this suit were dispensed with. The sloppy procedure that followed is the chief villain to whom the cur-

rent "mishmash" can be attributed. At the very least, however, the attempt to notify, however abortive, belies the current claims of lack of interest and adequate representation.

C. Petitioners Were Not Adequately Represented By Any Of The Parties

The District Court held that petitioners had been adequately represented. Why then are we here? Who bargained away our rights? Who had an interest not to?

The inadequacy of the representation of the existing parties can be shown by the fact that all of the existing parties had conflicting interests which had to affect their judgment.

The City corporate counsel could not represent the interest of the intervenors, because, among other things, the City was faced with a complaint seeking award of millions of dollars of damages and thus the City had a direct pecuniary interest in acceding to at least some of the demands of the plaintiffs in this action in order to avoid a potential judgment against it.

Secondly, the intervenors represented by Attorney W. Paul Flynn, had a direct and immediate interest in the settlement of the litigation without reaching its merits in that each of those persons purportedly represented by Mr. Flynn was in direct line for an immediate promotion or appointment which was being restrained as a result of a preliminary injunction entered into this case.

Thus, each of those individuals in considering any proposed settlement had a conflicting interest to weigh against the impact of that settlement.

These facts preclude a finding of adequate representation. 3B Moore, supra. p. 23-184.

II. THE QUOTA RELIEF ORDERED IS UNCONSTITUTIONAL AND VIOLATIVE OF SECTION 703 (J) OF TITLE VII

Although probably beyond the immediate scope of this petition we think it appropriate here to argue the District Court was wrong in its opinion that the remedy here ordered was not forbidden by the Constitution or Title VII of the Civil Rights Act of 1964.

While several courts have gingerly, if not enthusiastically approved quota remedies at the hiring level *Carter v. Gallagher* 452 F.2d 315 (8 Cir. 1971) on rehearing (en banc 452 F.2d at 327; *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, supra at 1483; *Boston Chapter NAACP v. Beecher*, 504 F.2d 1017 (1 Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053 (5 Cir. 1974, en banc) (only after District Court relief not involving quotas, see *Morrow v. Crisler*, 479 F.2d 960 (5 Cir. 1973), was shown not to have been followed in good faith, *Vulcan Society v. C.S.C.*, 490 F.2d 387 (2 Cir. 1973). *Commonwealth v. O'Neill, II*, 473 F.2d 1029 (3 Cir. 1973) reversing unanimously a promotional quota, the Courts have not approved color conscious relief at the promotional level. *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, supra; and note that in the above cited cases only relief at the hiring level was ordered. This Court has yet to rule even on the propriety of quota relief at the hiring level, but it is clear that the various Courts of Appeal have adopted a no quota policy as far as promotions are concerned. The underpinnings of this policy stated by this Court in the *Guardians* and quoted above, supra. p. 3, case are sound.

Moreover, returns are not yet final on the effect of 703 (j) of Title VII even for hiring quotas. On its face, 703 (j) appears to prohibit preferential treatment of any individual on account of racial imbalance in employment 42 U.S.C. 2000 e-2 (j).

There are compelling reasons which require a strict interpretation of that section. See dissenting opinion of Judge Hays, *Rios v. Enterprise Association Steamfitters Loc. 638*, 501 F.2d 622, 634-638 (2 Cir. 1974). In a well reasoned decision a California Superior Court judge recently wrote:

> "The vice of such a quota is that it would be subject to future fluctuations which would, again, have no specific bearing on the elimination of discrimination in employment practices. Racial quotas, generally, are viewed in our law with suspicion. They tend to freeze official conduct in the future by reference to yesterday's conditions. One need only look at racial proportions of 30 years ago and consider its impact on a racial employment quota, fixed at that time, to be alarmed at the future effect of restor to such devises. It must be remembered that quotas operate to *exclude* as well as *include*."

Hiatt v. City of Berkeley, Cal. Sup. (No. 453-459-2, Feb. 13, 1975).

When Congress prohibited quota relief for past discrimination, it meant just that. We believe the settlement order here "acquiesced in but not agreed to" violates that policy.

CONCLUSION

It is respectfully submitted the Court should grant petitioners' prayers for a Writ of Certiorari.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that (3) copies of the foregoing was sent, postage prepair. on this 11th day of July 1975 to the following counsel of record:

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J. DANIEL SAGARIN

APPENDIX

OPINION BELOW

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FIREBIRD SOCIETY, ET AL.	:	
	:	
v.	:	CIVIL NO. 15876
	:	
MEMBERS OF THE BOARD OF FIRE COMMISSIONERS, ET AL.	:	

RULING ON MOTION TO INTERVENE

On August 30, 1974, this Court approved and issued a decree which for all practical purposes had the effect of settling before trial the instant lawsuit. All the parties to the action "acquiesced in" and agreed not to appeal the Court's order "in order to end this litigation." Subsequently, on September 20, 1974, the Applicants for Intervention filed motions which seek:

(a) to intervene as a matter of right under Rule 24 (a), F. R. Civ. P.; or

(b) permission to intervene under Rule 24(b), F. R. Civ. P.;

(c) to reopen the judgment and vacate the August 30th Order of this Court;

(d) to participate in this litigation, presumably after judgment is reopened, by raising certain defenses and cross-claims to the action; and

(e) to appeal the Order of August 30th to the Court of Appeals for the Second Circuit.

On October 5, 1973, this Civil Rights Act suit for declaratory and injunctive relief as well as damages was commenced to challenge the constitutionality of the hiring and promotional procedures with respect to minority groups in the New Haven Department of Fire Services ("Department"). The plaintiffs were the Firebird Society of New Haven, Inc. ("Firebirds"), an organization composed of all the black firemen in the Department, several members of that organization, and certain past and prospective minority applicants to the Department. The defendants included the New Haven Board of Fire Commissioners, the Civil Service Commission of the City of New Haven, the Fire Department and its Chief, and the City of New Haven and its Mayor. Upon motion, 17 white Captains in the Department who had been appointed but not assigned to duty were permitted to intervene as defendants. Jurisdiction was premised on 28 U.S.C. § 1343 (3) and 42 U.S.C. § 2000e-5 (f).

The complaint, filed after the plaintiffs exhausted their administrative remedies with the Equal Employment Opportunity Commission and received a "right to sue" letter from the United States Department of Justice, see 42 U.S.C. § 200e-5 (f), levelled a broad attack on almost all aspects of the hiring and promotional practices of the Department on the ground of discrimination based and race and national origin. The selection of firemen was alleged to have

a racially disproportionate impact because the written examinations were not subject to an impartial professional validity study, were not job-related, and were improperly prepared, evaluated and graded. In addition, it was claimed that discrimination was enhanced by the Department's minimum requirements regarding age, education, height, weight, and prior arrests.

The plaintiffs further contended that there was a policy of discriminating against black firemen in promotional practices. As with the entry procedures, the plaintiffs focused on the written exam, particularly the testing methods utilized for the rank of lieutenant. They also condemned the "time in grade" requirement for promotion and the so-called "efficiency rating" both of which, it was asserted, were merely devices to discriminate against black firemen.

Extensive relief was requested which included, in addition to damages and back pay, the following:

> (a) A revised system for promotions under which qualified applicants are to be selected only from the class of plaintiffs, as openings arise, until they are represented as officers in the Department in proportion to their number among residents of the City of New Haven; or
>
> (b) A revised system for promotions under which qualified applicants are to be promoted alternately, one white and one minority from the class of plaintiffs, as openings arise, until they are represented as officers in the New Haven Fire Department in proportion to their number among residents of the City of New Haven; and
>
> (c) A revised system of hiring under which qualified applicants will only be hired from the class of plaintiffs,

as openings arise, until they are represented in the Department in proportion to their number among residents of New Haven; or

(d) A complete plan for promotions, recruitment and hiring which includes as part of any proportional hiring plan that such plan shall apply to all hiring done after filing of plaintiffs' complaint with the EEOC.

(e) The granting of seniority to plaintiffs and members of their class back to the rate that they first applied for a position in the New Haven Fire Department regardless of whether or not they passed the hiring selection criteria which have been determined to have been discriminatory.

II

When this action was commenced, the plaintiffs moved for immediate injunctive relief, claiming that on the basis of statistics alone, they could demonstrate a prima facie case of discrimination. Cf. *Morrow v. Crisler*, 479 F.2d 960 (5 Cir. 1973 (en banc); *Carter v. Gallagher*, 452 F.2d 315 (3 Cir. 1971), cert. denied, 406 U.S. 950 (1972).

Among other things, the plaintiffs pointed out that the minority population of New Haven was 30 percent, and that none of the 502 men employed by the Department was Hispanic and 18, or less than 4 percent, were black. There was one black lieutenant out of 61, no black captain out of 34, and no black officer in any higher command position. Thus, of the 107 officers in the Department only one was black, and he held the lowest rank above private.

The plaintiffs further expressed confidence that at an evidentiary hearing they could prove a pattern of willful discrimination against minorities in the Department that

extended over a period of many years. Serious claims and examples of intentional discrimination were alleged, supported in part by affidavits. In addition, the plaintiffs maintained that the defendants were attempting to block effective judicial redress by recently appointing 17 white captains from the eligible list just prior to the expiration of that list, and by selecting 18 new trainees (only one of whom was black) from a "substitute list" then in existence. Thus, if the plaintiffs prevailed in their lawsuit, they calculated that the relief they sought would have no practical effect for from one to eight years.

Counsel for the defendants, on the other hand, denied each of the plaintiffs' material allegations. However, with commendable candor, they admitted that the present hiring and promotional methods did have certain "deficiencies" which needed correction. They stressed that the entire matter was under review, and that experts had been retained by the City to design new exams which would meet all legal requirements. In order to avoid a costly, lengthy, and probably divisive lawsuit, they requested that this Court provide guidance to the parties so that their differences might be resolved.

Thereupon, it was agreed as follows:

1. That temporary injunctive relief would issue restraining the defendants from assigning, hiring or promoting anyone not in the plaintiffs' class, and from administering any written exams in conjunction with promotions within the Department;

2. That the 17 newly appointed white captains and the new trainees would not be assigned to duty;

3. That, in order to disseminate notice of the lawsuit

and of the right of interested persons to intervene in the action, copies of the Court's order and a list of all the plaintiffs' claims for relief would be posted in each of the City's firehouses, together with a covering notice advising all firemen of the lawsuit and suggesting that all interested firemen "wishing to intervene in this lawsuit are entitled to intervene and should seek counsel immediately to be present at a pre-trial hearing in the District Court at 2 P.M., Monday, October 15, 1973;"

4. That all discovery procedures and evidentiary hearings would be indefinitely postponed until every avenue of settlement was exhausted; and

5. That the plaintiffs would prepare a list of the issues and recommendations for settlement to serve as a guide for future conferences.

III

The next conference was held on October 15, 1973. In addition to counsel of record, Attorney W. Paul Flynn appeared and stated that although he was counsel for the New Haven Fire Fighters Local No. 825 ("Union"), he was not formally entering an appearance for the Union. However, he did wish to file a motion to intervene in behalf of the 17 white captains whose assignment to duty was enjoined by this Court's order of October 5, 1973. The motion to intervene was orally granted and thereafter Attorney Flynn played an active role in the negotiations.

The basic issues were defined by the plaintiffs as follows:

1. What amount of compensatory and punitive damages should the defendants pay as a result of past discrimination?

2. In the light of past discrimination, what concessions

would the defendants make with respect to the "time in grade" restrictions for promotions?

3. What steps toward recruitment would the defendants undertake to increase the number of minorities in the Department?

4. When and how could the defendants devise new entrance and promotional exams to conform to the requirement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e?

5. What means would be employed to achieve substantial minority representation in the Department?

6. What method should be utilized to increase minority representation in the ranks of lieutenant and captain?

7. What attorneys' fees should be awarded to plaintiffs' counsel?

IV

Ten months later, due to the extraordinary efforts of counsel and the cooperation of their respective clients, all the aforementioned issues were finally resolved without trial when this Court issued its decree of August 30, 1974.

However desirable, it is an impossible task to recollect and recount herein each and every material factor which culminated in the entry of the final order. The several court hearings and the numerous orders filed by this Court are of course a matter of record. In addition, however, there were 23 chambers conferences, some of which extended long into the evening. These meetings were held with the knowledge and approval of all counsel of record and included, at one time or another: the attorneys for the parties and interven-

ing defendants, high ranking officials of the City, officers of the Union, individuals named as defendants including the Chairman and several members of the Board of Fire Commissioners, certain white firemen who were not named as parties, the Chief of the Department, and others.

In order to encourage and maintain the free, open and candid exchange of ideas, these meetings were regarded by all in attendance to be "off the record" discussions. Despite this, the news media, due to the inevitable "leaks," widely reported the scheduling of these conferences and many of the doings therein. Moreover, counsel were required to make progress reports to their clients and to obtain their consent to the innumerable preliminary agreements which formed the basis for the final decree. Since so many persons were necessarily involved in the negotiations which led to a final settlement, it is difficult to assume that the nature and content of the chambers meetings were secret. In fact, on occasions, counsel informed the Court that at union meetings or while they visited firehouses throughout the City, they were "grilled" on the latest developments and felt obliged to respond.

From the outset it was evident that amicable resolution of the issues required many concessions by the plaintiffs. After the first round of negotiations, the plaintiffs agreed to drop their demand for back pay and for exemplary and actual damages. However, the plaintiffs insisted that minorities occupy 25 percent of the privates' rank, 15 percent of the lieutenants' rank, 15 percent of the captains' rank, 10 percent of the Battalion Chiefs' rank, and 15 percent of "other supervisory" positions within a period of four years. In addition, the plaintiffs refused to agree to modify the existing orders which restrained the defendants from filling

existing vacancies in the Department. It appeared clear to the Court that the defendants would not accede to these demands without substantial modifications, particularly with respect to positions above the rank of private.

Nevertheless, significant progress toward the resolution of most of the issues in the case was made when, after a series of meetings, the parties acquiesced in this Court's Order of December 5, 1973. First, a detailed plan for the recruitment of minorities into the Department was established. Second, the Department was ordered to develop entrance and promotional tests as soon as possible which meet the requirements of 42 U.S.C. §§2000e, *et aeq*. Third, in order to achieve substantial minority representation in the Department, while not displacing any men already employed, the Department was required to hire at least 16 of the next 24 firefighters from among qualified minority group applicants and, thereafter, to hire at least one minority applicant for every non-minority applicant until the total number of minority privates reaches 75. Fourth, since seven vacancies existed at the rank of captain, the Court modified its injunction to permit seven white firemen (who had been appointed but not assigned) to fill these positions. Fifth, the Court permitted the 18 probationary firemen (who had been sworn into office but not assigned) to be assigned to regular duty. Sixth, the "time in grade" requirement was modified to provide that any private may take the lieutenant's examination 30 months after his appointment and "other officers" may take the examination for the next higher rank after 12 months at the rank below the one for which the examination is given. Seventh, the defendants promised to exercise "good faith" to insure that minorities would have representation in the ranks of lieutenant and captain. Finally, the Order incorporated the agreement of

the parties that the plaintiffs would waive their claims for damages but not attorneys' fees.

The major question remaining at this time concerned the amount of "good faith" on promotions that the defendants had to demonstrate before the suit would be settled. After much negotiation, the plaintiffs agreed not to prosecute the action if seven qualified blacks were selected out of the next 21 lieutenants to be appointed within a two-year period and if, in addition, one qualified black captain was assigned within a reasonable time thereafter. At this Court's request, an "in camera" agreement was drafted which merely placed in writing the plaintiffs' unilateral "promise" not to proceed with the lawsuit in the event seven minority lieutenants and one minority captain were appointed as a result of the next lieutenants' and captains' examinations. It is important to point out that the examinations in mind were the new tests mandated by this Court's Order of December 5, 1973. It was anticipated that the defendants' experts would prepare these validated examinations prior to February 15, 1974.

Soon thereafter, however, the defendants reported they would be unable to develop validated exams for some time to come. They suggested that the testing for lieutenants proceed as scheduled with the understanding that the results thereof not be disclosed or acted upon until the plaintiffs were afforded the opportunity to renew the suit and address appropriate motions to the Court in the event seven minorities were not within the first 21 eligible for promotion. The plaintiffs agreed and the Court's Order of December 5, 1973 was amended.

Another problem arose when, in violation of this Court's injunction, the Board of Fire Commissioners promoted two

white firemen to the rank of lieutenant. The matter was eventually resolved after a series of conferences which included counsel, the members of the Board of Fire Commissioners, officials of the Union, the two promoted firemen, and the Court. The two men were permitted to take their assignments as lieutenants with the reservation that the promotions were open to challenge if plaintiffs should activate the lawsuit in the future.

The lieutenants' examination proceeded on schedule and on May 22, 1974, the defendants presented the results to the Court and the plaintiffs. While seven blacks were demonstrated to be qualified, none appeared in the top 21 rankings. The plaintiffs reiterated their original contentions that the test had a substantial discriminatory impact on minorities and exercised their right to activate the lawsuit. As a result, the injunction covering promotion to the rank of lieutenant was continued, a discovery schedule was agreed upon, and a trial date was set by the Court for September 15, 1974.

While discovery procedures were underway, counsel for the defendants and the intervenors urged the Court on several occasions to reopen settlement negotiations. The Court did so. While perhaps no specific representation was made, the Court is satisfied that it was induced to resume negotiations because high level officials of the City and Union, as well as the party defendants, firmly believed trial should be avoided if any avenue for settlement remained open.

Intensive negotiations commencedagain. The main obstacle to a settlement was removed when the plaintiffs agreed to have seven qualified black firemen on the lieutenants' eligibility list "slotted into positions" which would insure

their appointments within the two-year period before the list expired by law. Based on their knowledge and experience, the defendants were reasonably certain that not more than 21 lieutenants would be assigned within the specified period. When the Court expressed the desire that the seven "displaced" white firemen be protected, the parties agreed to the provision in the final decree that the eligibility list shall not expire until "at least 28 appointments shall be made thereon." White were placed on the list strictly in order of their combined promotional scores. The blacks were also listed in order of their scores, and their names inserted at intervals in positions 4, 7, 10, 13, 16, 19 and 22 on the eligibility list.

All the agreements arrived at by the parties after ten months of negotiations were incorporated into this Court's Order of August 30, 1974, which decree was "acquiesced in by all of the parties to the suit in order to end this litigation."

V

The Court must consider the motions filed by the Applicants for Intervention (hereinafter "applicants") in light of the background just set forth.

The applicants are the Firefighter's Committee to Preserve Civil Service, Inc., a non-profit corporation organized under Connecticut law after the entry of this Court's Order on August 30, 1974, and certain non-minority firemen within the New Haven Department of Fire Services in the ranks from private to battalion chief. The sole purpose for the formation of the corporate applicant was to intervene in this lawsuit and to set aside the Court's final decree in order to "preserve a system of promotions within and appointments to the New Haven Department of Fire Services

based upon merit and not upon considerations of race." The individual applicants are three captains, two battalion chiefs, one lieutenant, a fireman not on the lieutenants' eligibility list, and nine privates, two of whom are at the top of the current eligibility list and seven of whom rank beyond the 28th position on the list.

At the outset, the Court notes its difficulty in determining what "interest" the applicants seek to protect by intervention. No one of the applicants is adversely affected by the Court's Order: the two private at the top of the eligibility list will be assigned promptly; the other eight privates would most probably not be assigned even if the seven minorities were removed from the list; and, the remaining individuals either hold the rank of lieutenant or a higher rank. Nor do the applicants who seek to intervene possess a protectible "interest" in the assignment list into which the names of the minority firemen were inserted. The present list was compiled only as a result of the plaintiffs' consent to the lifting of the injunction and to the administration of the non-validated examination, as a starting point in a program designed to ameliorate the continuing effects of past discrimination. If the Court's Order were set aside, there is now every reason to believe that appointments and assignments to the rank of lieutenant would be enjoined until validated tests were developed and a new eligibility list drawn from the results thereof. Thus, were the applicants permitted to intervene and to reopen the Court's Order of August 30, 1974, there would necessarily be a nullification of the present eligibility list, and whatever "interest" the applicants had in this list would disappear.

Relying on the principles enunciated in *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*, 482 F.2d 1333, 1342 (2 Cir. 1973), the appli-

cants assert they are opposed to the implementation of a "quota promotional remedy" which is proscribed by various provisions in the Charter of the City of New Haven, the Civil Service Rules, and the Union's collective bargaining agreement with the Department.

In *Bridgeport Guardians*, the Second Circuit condemned a remedial system of promotion whereby a certain ratio of promotions had to come from the minority personnel until 15 percent of the officers were minorities. The Circuit Court reasoned:

> . . . the imposition of quotas will obviously discriminate against those Whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.
>
> 482 F.2d at 1341.

Here, however, no quota has been imposed. Rather, the terms of the settlement in the case at bar simply grant interim priority relief to qualified members of a minority who have previously been denied equal opportunity for advancement as a result of examinations which had racially disproportionate impact. The merit system remains intact for all future promotions. In the Court's opinion, this remedy is neither forbidden by the Constitution nor prohibited by Title VII of the Civil Rights Act of 1964. See, e.g., *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1 Cir. 1974); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622 (2 Cir. 1974); *N.A.A.C.P. v. Allen*, 493 F.2d 614, 618-20 (5 Cir. 1974); cf. *Morrow v. Crisler*, supra; *Vulcan Society v. C.S.C.*, 490 F.2d 387 (2 Cir. 1973). Since the applicants lack the prerequisite interest in the

subject matter of this action, they may not intervene as of right pursuant to Rule 24(a), F. R. Civ. P.

The applicants have failed in other respects to demonstrate that they have a right to intervene under Rule 24(a) or, alternatively, that they should be permitted to intervene pursuant to Rule 24(b). Both rules provide for intervention only upon "timely application." The present motions were neither served nor filed until three weeks after the entry of the Order terminating the case. Absent unusual and compelling circumstances, an application to intervene is untimely if the litigation has been concluded and judgment entered. See, e.g., *Allegheny Corp. v. Kirby*, 344 F.2d 571, 574 (2 Cir. 1965), cert. dismissed as improvidently granted, 384 U.S. 28 (1966); *United States v. Blue Chip Stamp Company*, 272 F.Supp. 432, 435-441 (D.C. Cal. 1967), aff'd sub nom. *Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580 (1968); *Slusarski v. United States Lines Co.*, 28 F.R.D. 388, 390 (E.D. Pa. 1961). No such circumstances exist here.

It seems clear to the Court that the applicants had ample notice of the pendency of the lawsuit and the nature of the relief claimed. The three documents posted in early October, 1973 in each firehouse, which no one of the applicants denies seeing or reading, included: 1) a notice which stated that the lawsuit involved a claim of racial discrimination with respect to "promotions" and invited each interested fireman to intervene in the action; 2) a copy of the complete list of the remedies sought by the plaintiffs, with references throughout to "promotions" and "system for promotions"; and 3) a copy of this Court's preliminary injunction, enjoining the promotion of "anyone not in plaintiffs' class" and restraining all "written exams in conjunction with promotions." Although an attorney who claimed to speak for the Union appeared and filed a motion to intervene on be-

half of 17 white captains, none of the applicants sought to enter into the case at that time. In addition, the Court's Order of December 5, 1973, which was a matter of public record and was widely reported by the news media in the area, contained several sections dealing with future hiring and promotions in the Department. If the applicants were truly disturbed by the prospect of a "quota promotional remedy," they might have sought intervention at that time. Instead, the applicants have slept on whatever rights to intervene they may have had and now, dissatisfied with the settlement in the case, seek to set it aside. Cf. *Basle Theaters, Inc. v. Warner Bros. Pictures Distributing Corp.*, 24 F.R.D. 476, 477 (W.D. Pa. 1959).

Futhermore, to permit the applicants to reopen this case would result in unfair delays and consequences to the parties who have relied on the settlement agreement and the negotiations which produced it. The plaintiffs have already waited almost a year and a half since commencing this suit to vindicate their rights. At all times, the parties have bargained in good faith in the belief that an amicable settlement of a potentially divisive lawsuit was in process. Moreover, during the pendency of this lawsuit, and with the acquiescence of the plaintiffs, recruitment and hiring programs were established, promotions have been made, substitute firemen have been assigned, a schedule for the development of properly validated promotional exams was reached, and procedures for administering promotional examinations in the interim were agreed on and implemented. This complex web of acts in reliance upon the settlement negotiations would have to be unwoven if the case were reopened, and further delay in meeting the City's need for the appointment of new fire department officers would necessarily ensue.

Finally, the Court denies the motion to intervene on the ground that the applicants' rights were adequately represented by the existing parties and the intervenors. As stated hereinbefore, the final decree was agreed upon only after the most intensive negotiations, with all aspects of hiring and promotions within the Department being carefully weighed and reviewed, by officials of the City, the Civil Service Commission and the Department as well as by the 17 white captains who were permitted to intervene. The Court is satisfied that, under the circumstances of this case, no good reason has been shown to allow intervention; the rights of every fireman within the Department have been fully considered and protected. Cf. *Afro American Patrolmens League v. Duck*, 503 F.2d 294,, 298 (6 Cir. 1974); *United States v. Carroll County Board of Education*, 427 F.2d 141, 142 (5 Cir. 1970).

Accordingly, the applicants' motion to intervene and all related motions are denied.

Dated at New Haven, Connecticut, this 3rd day of February, 1975.

ROBERT C. ZAMPANO
United States District Judge

STATUTES INVOLVED

Rule 24.

INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest

relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

RULES AND STATUTES INVOLVED
RULES OF CIVIL PROCEDURE

Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) *he claims an interest relating to the*

subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons

of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS
Circuit Judges,

FIREBIRD SOCIETY, ET AL., PLAINTIFFS-RESPONDENTS	:	
v.		
MEMBERS OF THE BOARD OF FIRE COMMISSIONERS, CITY OF NEW HAVEN, ET AL., DEFENDANTS-RESPONDENTS	:	75-7115
THE FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, INC., INTERVENORS-PETITIONERS	:	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the intervenors-appellants.

It is further ordered, adjudged and decreed that the stay previously granted be and it hereby is continued until 4:00 P.M. Thursday, April 17, 1975.

A. DANIEL FUSARO, Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk